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In the

Supreme Court of the United States

OCTOBER TERM, 1968

ELMER E. MILLS AND LOUIS SUSMAN,
Petitioners,

vs.

THE ELECTRIC AUTOLITE COMPANY
MERGENTHALER LINOTYPE COMPANY and
AMERICAN MANUFACTURING COMPANY, INC.,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. Respondents concede (Br. p. 9) that a controlling question of law is presented: whether under *Borak* liability turns upon a finding of causal relationship between the unlawful "proxy material and the merger",[1] on the one hand, or upon a finding that the specific misleading omissions actually produced the favorable shareholder vote, on the other. That question should be reviewed now because it is "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945); *Land* v. *Dollar*, 330 U. S. 731, 734 n.2 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 685 n.3 (1949).

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[1] *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 431 (1964).

If, as petitioners submit, *Borak* envisions only the former causal relationship, established by undisputed facts below (Pet. pp. 25a-26a), then litigation of the latter issue places a heavy and unwarranted burden on vindication of shareholder rights and defeats "the overall purposes of federal . . . policy." *Glover* v. *St. Louis-San Francisco R.R.*, 393 U. S. 324, 330 (1969). Petitioners now "must face further proceedings" on liability which, if they read *Borak* correctly, the courts below "have no power to conduct." *Construction Laborers* v. *Curry*, 371 U. S. 542, 550 (1963).

2. By transforming the question of causation into an issue of reliance, and converting reliance into a question of fairness of the financial terms of merger, the court below has sanctioned a defense to a violation which is unsupported by any authority. Since the preparation of the Petition, this defense of fairness has been specifically rejected by another court. In *Gerstle* v. *Gamble-Skogmo, Inc.*, ... F. Supp. ....., CCH Fed. Sec. L. Rep. ¶92,367 (E.D.N.Y., March 7, 1969), the court said (pp. 97,749-97,750):

> "Assuming, *arguendo*, there was a failure to disclose a material fact in the proxy statement, defendant claims that since the plan of merger was fair the plaintiffs suffered no damages. . . . When a seller is induced to sell his property by means of a statement which he subsequently learns is false, the fact that the sales price was fair at the time is irrelevant. The seller may thereafter maintain an action in equity for a rescission of the contract and an accounting of the proceeds and the ensuing profits. If the property cannot be returned, the plaintiff is entitled to restitution. *Falk* v. *Hoffman*, 233 N. Y. 199, 135 N. E. 243 (1922). *Janigan* v. *Taylor*, supra [344 F.2d 781 (1st. Cir. 1965), cert. denied 382 U. S. 879 (1965)] and *Kardon* v. *National Gypsum Co.*, 73 F. Supp.

798, *modified* 83 F. Supp. 613 (E.D.Pa. 1947), decided under §10(b), have both held that damage at the time of the sale of the stock is not an element of the cause of action if there has been a violation of the disclosure requirement. In this case the stockholders were defrauded by voting for a merger without vital information withheld by insiders. * * * The purpose of §14(a) was to prevent such frustration of stockholders. (H. R. Rep. No. 1383, 73d Cong., 2d Sess. 13, 14). The exercise of this right cannot be defeated by the mere promulgation of a fair plan in a merger proceeding."[2]

Beyond this added conflict among the lower courts, certiorari is required because "these rulings by the Court of Appeals [interposing new defenses] threaten the effectiveness of the private action as a vital means for enforcing the . . . policy of the United States . . . ." *Perma Life Mufflers* v. *International Parts,* 392 U. S. 134, 136 (1968).

3. Respondents seek to belittle the importance of this case (Br. p. 14) by ignoring the holding of both courts below that they were guilty of a *material* violation of §14(a), and that the proxy statement unlawfully omitted facts to which "a *reasonable* man would attach importance . . . in determining his choice of action in the transaction" and "which in reasonable and objective contemplation * * * may affect the desire of investors to buy, sell, or hold the company's securities." *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833, 849 (2 Cir. 1968). By super-adding the requirement of unfairness, and holding that corporate promoters have done no wrong, by resorting to fraud hav-

[2] Contrary to respondents' contention (Br., p. 3, fn. 1), violations of Section 10(b) and 14(a) are neither created nor destroyed by fluctuations in the Dow-Jones averages.

ing intended, reasonable, and probable effects on the mind of the investor, unless it is also found as a fact that the investor's mind was actually changed, the court below has potentially immunized every violation of any federal law requiring full disclosure for the protection of the public.[3]

4. Respondents' repeated assertion that "Petitioners have not been 'denied a remedy'" (Br., pp. 6, 7, 13, 15), is in flat contradiction to the Court of Appeals' direct holding. The District Court had held that liability was established, and that petitioners were entitled to a remedy to be fashioned. The Court of Appeals did not affirm but reversed, holding that petitioners were entitled to no remedy, and would be entitled to none without a finding that "the misleading statement and omission caused the submission of sufficient proxies"; the fairness of the merger, in its financial terms, would show no "causation", and immunize the violation. (Pet. 11a). The petitioners bought stock to become part owners in an automotive parts business, and they are here asserting their federally protected right to continue that ownership until altered by corporate action in compliance with federal law. Through an admitted and adjudged violation of that law, they have been made part owners in a conglomerate, against their will. This wrong, they are told by the Court of Appeals, does not warrant relief.

5. Respondents' argument that certiorari is not available "to review non-final judgments" (Br. p. 7) is based on misconception. Section 1254 of the Judicial Code contains no such requirement, but on the contrary authorizes certiorari before or after the Court of Appeals decision.

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[3] This Court has recognized that Sections 10(b) and 14(a) apply *in pari materia* in merger cases. *SEC v. National Securities, Inc.*, 393 U. S. 453 (1969).

Authorities cited which arise under other statutes requiring a "final decision" for appellate review have no application,[4] and serve rather to emphasize the broad discretion conferred by §1254. The fact that a Court of Appeals has remanded a case for trial upon holding summary judgment improper does not, of course, prevent review in this Court. E. g., *United States* v. *Coleman*, 390 U.S. 599 (1968); *Wyandotte Trans. Co.* v. *United States*, 389 U.S. 191 (1967). Cf. *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). Having taken advantage of the procedures of §1292(b) of the Judicial Code to obtain review of "a controlling question of law" on the ground "that an immediate appeal may materially advance the ultimate termination of the litigation", respondents now shift position and argue that further review of this "controlling question" is somehow improper. Consonant with the policy of that section, this Court properly reviews decisions which the Court of Appeals had power to render, without regard to the interlocutory character of the District Court decision. See, *e.g.*, *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967) (denial of motion to dismiss complaint under securities laws); *Ross* v. *Bernhard*, ... U.S. ..... (Dkt. No. 992,

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[4] Of the four cases cited on page 7 of Respondents' Brief, *Cobbledick* and *American Construction* arose under statutes specifically requiring a "final decision" and a "final judgment," respectively. *Hamilton-Brown Shoe* involves merely the familiar proposition that the denial of certiorari does not constitute affirmance. In *Locomotive Firemen*, the petitioners had succeeded in persuading the Court of Appeals to overturn the District Court's order, and the denial of certiorari merely confirmed this Court's tradition of not granting review at the instance of the party who prevailed in the Court of Appeals.

cert. granted March 24, 1969) (striking jury demand in securities case); *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962).

The opinion of the Court of Appeals itself (Pet. pp. 1a-12a) stands as sufficient refutation of respondents' repeated epithets (Br. 1, 2, 7, 9) of "distortion" and "misleading" statements in the Petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted so that this Court may settle the conflict among the lower courts and determine the elements of the private cause of action necessary to the enforcement of the federal policy for protection of investors.

Respectfully submitted,

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